U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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[redacted]

JAN 27 2005

FILE: EAC 03 023 51888 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary as an L-1A intracompany transferee pursuant to § 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a corporation organized in the State of New York that is operating a $.99 discount and variety store. The petitioner claims on the nonimmigrant petition that it is the parent of the beneficiary's foreign employer, located in Karachi, Pakistan. The petitioner now seeks to employ the beneficiary as its chief executive officer for one year.

The director denied the petition concluding that the petitioner had failed to demonstrate: (1) that a qualifying relationship exists between the beneficiary's foreign employer and the petitioning organization; and (2) that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

On appeal, counsel explains that his office mistakenly identified on the nonimmigrant petition the relationship between the foreign corporation and a third United States company, rather than the foreign corporation's relationship to the petitioning organization. Counsel further explains that the beneficiary "is the 100% owner of the foreign entity, and 51% owner of the US entity," and notes that a second individual is the 49% owner of the petitioning organization. Counsel also contends that the director erroneously interpreted the statute and regulations in determining that the beneficiary would not be employed by the petitioner in a qualifying capacity. Counsel outlines the beneficiary's proposed job duties and claims that they are "executive" and "customarily associated with the position of Marketing Manager in the context of a small organization such as [the petitioning organization]." Counsel submits a brief and documentation in support of the appeal.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act, 8 U.S.C. § 1101(a)(15)(L). Specifically, within three years preceding the beneficiary's application for admission into the United States, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

(i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.

(ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

(iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

(iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education,

training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The AAO will first address the issue of whether the beneficiary's foreign employer and the petitioning organization possess a qualifying relationship as required in the Act at section 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L).

The pertinent regulations at 8 C.F.R. § 214.2(l)(1)(ii) define the term "qualifying organization" and related terms as follows:

(G) *Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:

(1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;

(2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee; and,

(3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

* * *

(I) *Parent* means a firm, corporation, or other legal entity which has subsidiaries.

(J) *Branch* means an operating division or office of the same organization housed in a different location.

(K) *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

(L) Affiliate means

(1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or

(2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

The petitioner noted on the nonimmigrant petition, filed on October 28, 2002, that it is the parent company of the beneficiary's foreign employer, and further stated that both entities are wholly owned by an individual, [redacted] Alternatively, in an accompanying letter from the petitioner, dated September 24, 2002, the petitioner stated that the beneficiary's foreign employer is the parent company of the United States organization, and noted that the beneficiary "remains the majority shareholders [of both companies] and control[s] both entities as President and Chairman of the Board of Directors." The petitioner claimed that the bank statements included with the attached documentation evidence the beneficiary's direct involvement in the petitioning organization and stated that the statements confirm that funds had been transferred to the petitioning organization in order to conduct business in the United States. While the petitioner also references wire transfer statements, the record is devoid of this documentation. The petitioner submitted its receipt of incorporation, articles of incorporation, and tax statements. With regard to the foreign corporation, the petitioner provided bank statements and two letters from Pakistani banks confirming that the beneficiary maintains financial accounts with each bank as the proprietor of the foreign entity.

In a request for evidence issued by the director on December 4, 2002, the director asked that the petitioner submit evidence reflecting the ownership interests of both the foreign and petitioning organizations. The director also requested that the petitioner submit its recent bank statements and quarterly tax returns.

Counsel responded in a letter dated February 26, 2003 stating that the beneficiary is the sole proprietor of the foreign organization. As evidence of the beneficiary's ownership, counsel submitted a January 2003 national tax number certificate issued by the revenue division of the government of Pakistan, which listed the beneficiary and identified the status of the foreign organization as "business individuals." Counsel also included the foreign entity's financial statement for the year ending on June 30, 2001, which identified the beneficiary as its proprietor on the statement's cover page. As evidence of ownership of the petitioning organization, counsel submitted a membership certificate identifying the beneficiary's foreign employer as a member of the United States corporation.

In a decision dated April 15, 2003, the director determined that the petitioner had failed to demonstrate that the beneficiary's foreign employer and the petitioning organization possess a requisite qualifying relationship. The director noted the discrepancies in the evidence submitted by the petitioner with regard to the ownership of both organizations, and further stated that the documentation submitted in response to his request is inconsistent with the petitioner's claim that both companies are owned entirely by [redacted] The director concluded that a qualifying relationship did not exist between the two entities. Accordingly, the director denied the petition.

In an appeal filed on May 16, 2003, counsel explains that his office mistakenly outlined on the nonimmigrant petition the ownership interests of the beneficiary's foreign employer and a third United States organization, TM Dollar Variety, LLC, rather than the ownership interest of the petitioning organization. Counsel states that the documentation submitted with the nonimmigrant petition, as well as the similarity in the business' names, confirm the "obvious" error. With regard to the ownership of the foreign and petitioning organizations and the third United States business, counsel states that the beneficiary "is the 100% owner of the foreign entity, and 51% owner of the US entity," and notes that [redacted] is the 49% owner of the petitioning organization.

On review, the record does not substantiate the petitioner's claim that a qualifying relationship exists between the beneficiary's foreign employer and the petitioning organization. The regulations and case law confirm

that the key factors for establishing a qualifying relationship between the U.S. and foreign entities are ownership and control. *Matter of Siemens Medical Systems, Inc.* 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982); *see also Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988) (in immigrant visa proceedings). In the context of this visa petition, ownership refers to the direct and indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International,* 19 I&N Dec. at 595.

The record clearly contains discrepancies in the ownership and control of the petitioning organization. As noted by the director, the petitioner's claim on the nonimmigrant petition that it is the parent company of the beneficiary's foreign employer is inconsistent with the documentation subsequently submitted by counsel, which included a membership certificate identifying the beneficiary's foreign employer as the sole member, or parent, of the petitioning organization. The record is further complicated by counsel's claim on appeal that the beneficiary is the owner of 51% of the United States entity, whereas 49% of the petitioning organization is owned by [redacted] Counsel neither documents [redacted] ownership interest in the petitioning company, nor explains the material change in the petitioner's ownership. Moreover, counsel does not clarify whether his reference to the beneficiary's 51% interest in the "US entity" refers to the petitioning entity or the third United States company. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The AAO also notes that the statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). Absent consistent documentation of the ownership interests in the petitioning entity, the AAO cannot conclude that a qualifying relationship exists between the beneficiary's foreign employer and the petitioning organization.

The AAO also notes that the majority of financial documentation relating to the foreign entity, and specifically the corporation's bank statements, reflect the currency in rupees rather than in U.S. dollars. Because the petitioner failed to submit certified translations of the documents, the AAO cannot determine whether the evidence supports the petitioner's claims. *See* 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding. Accordingly, the appeal will be dismissed.

The AAO will next consider the issue of whether the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

> The term "managerial capacity" means an assignment within an organization in which the employee primarily-
>
> (i) Manages the organization, or a department, subdivision, function, or component of the organization;

(ii) Supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

(iii) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

(iv) Exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily-

(i) Directs the management of the organization or a major component or function of the organization;

(ii) Establishes the goals and policies of the organization, component, or function;

(iii) Exercises wide latitude in discretionary decision-making; and

(iv) Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner requested on the nonimmigrant petition that the beneficiary be approved for employment as the chief executive officer of its organization. In the attached September 2002 letter, the petitioner provided the following with regard to the beneficiary's proposed job duties:

[The beneficiary's] duties include the following specific duties such as: analyzing the market conditions in New York and other parts of the United States to determine an appropriate marketing policy; determining the scope of business operations in the United States and designing appropriate operational and managerial structures in order to get this start up company to be fully operational and profitable; [b]e responsible for all aspects of operating the company, including selection of location, personal [sic] matters, pricing policies, determination of products to be offered, negotiations with appropriate business partners etc. The duties will also include overseeing and managing the finances of the company, including review and determination of appropriate strategies to make the company profitable; [d]eveloping and implementing plans for both short-term as well as long-term growth; determine and set corporate policies, goals and objectives.

The petitioner further stated that the beneficiary has an essential role in the United States business, as it is necessary that "he continue to contact, develop and negotiate tour plans with the US entities [currently dealing with the petitioner]."

In the director's December 2002 request for evidence, the director asked that the petitioner submit the following documentation: (1) the number of employees and job titles of those presently employed by the petitioner; (2) the education credentials of the petitioner's current employees; (3) the average weekly gross pay of the petitioner's employees; (4) the petitioner's two most recent quarterly income tax returns; and (5) the number of employees the petitioner anticipates hiring within one year and each person's proposed job title.

In counsel's February 2003 response, counsel submitted the petitioner's 2002 fourth quarter payroll summary. The payroll summary identified two employees, a manager and a cashier, each with a weekly gross wage of approximately $200.00. The petitioner's attached marketing plan indicated that the petitioner anticipates hiring the following four employees within one year: marketing manager; cashier/import and export clerk; floor man/administrative assistant; security guard. The petitioner also submitted its September and December 2002 quarterly tax returns.

The director determined in his April 2003 decision that the petitioner did not demonstrate that the beneficiary would be employed in the United States organization in a primarily managerial or executive capacity. The director, referring to the information contained on the petitioner's quarterly tax returns, stated that the petitioner's small staff and the nature of its business as a "dollar store" indicates that the beneficiary would not be employed in the United States in a qualifying capacity. The director therefore denied the petition.

On appeal, counsel contends that the director erroneously applied the statutory definition and regulations to his analysis of the instant matter. Counsel claims that the beneficiary would be employed by the petitioner as the manager of its sales and marketing activities and would be responsible for: (1) overseeing the petitioner's operations in the United States and coordinating them with the Pakistani company; (2) managing the administrative operations, including marketing, personnel and general affairs; (3) developing and implementing plans for long-term growth and setting corporate policies and goals; (4) overseeing and managing financial operations; and (5) analyzing, developing and implementing the petitioner's marketing plans. Counsel also states that the beneficiary would possess wide discretionary power with respect to daily decision-making including the hiring, training, retaining and discharging of the petitioner's staff. Counsel claims that the above-mentioned "executive" job duties are typical of a marketing manager in a small organization. Counsel contends that CIS' refusal to consider the beneficiary's proposed job duties "within the executive/managerial parameters is to fail to acknowledge that in the real business world it is not uncommon for executives and managers to perform the so-called 'general' responsibilities beyond the scope of their regular core duties."

Counsel also refers to three decisions in which the Commissioner determined that the beneficiaries' job duties were managerial or executive in nature "without discussion of the levels of supervision." Counsel claims that past legislation prevents CIS from considering the number of employees supervised in an organization as the sole basis for determining whether a beneficiary is an executive or manager. Counsel further states that CIS is required to consider the petitioner's relatively new operations, which commenced in 2001, and should afford the petitioner "an opportunity to germinate and develop." Counsel claims that the beneficiary's executive and managerial job duties would expand with the growth and development of the organization.

On review, the petitioner has not established that the beneficiary would be employed by the petitioning organization in a qualifying capacity.

The AAO will first address counsel's claim on appeal that CIS should consider the petitioner as a relatively new business when determining the employment capacity of the beneficiary. When a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed. In the instant matter, however, the record contains evidence that the petitioner has been doing business prior to the filing of the nonimmigrant petition, such as New York State and Local Sales and Use Tax Returns for December 2001 through August 2002 and a lease agreement for store premises dated May 1, 2001. Therefore, the petitioner is not eligible for consideration as a new office. *See* 8 C.F.R. § 214.2(l)(1)(ii)(F). In fact, the petitioner noted on the nonimmigrant petition that the beneficiary would not be transferred to the United States for the purpose of opening a new office. Therefore, despite counsel's claim, the petitioning organization will not be considered a new office for purposes of determining the beneficiary's proposed employment as a manager or an executive.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). As required in the regulations, the petitioner must submit a detailed description of the executive or managerial services to be performed by the beneficiary. *Id.*

The petitioner does not clarify whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. A petitioner may not claim to employ the beneficiary as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. A petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if it is representing the beneficiary is both an executive and a manager.

In the instant matter, the petitioner identifies the beneficiary as the chief executive officer and the president. On appeal, however, counsel states that the beneficiary would be employed as the manager of the petitioner's sales and marketing functions. Counsel also identifies both managerial and executive job duties, such as managing the petitioner's administrative operations and developing and implementing corporate plans, policies and goals, yet states that as the marketing manager, the beneficiary would perform "duties [that] are of an executive nature." Counsel further identifies the beneficiary's responsibilities as "executive/managerial." Despite counsel's claim that the beneficiary would perform both managerial and executive job duties, counsel has failed to establish that the beneficiary meets the four requirements of each employment capacity. Moreover, the inconsistent references by the petitioner and counsel to the beneficiary's position as chief executive officer, president and marketing manager clearly creates discrepancies in the record as to the actual job to be performed by the beneficiary. The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. at 591-92.

Additionally, the petitioner's description of the beneficiary's proposed job duties demonstrates that the beneficiary would be performing non-qualifying operations of the United States business. The petitioner stated in its September 2002 letter that the beneficiary would analyze market conditions in the United States,

develop the petitioner's marketing policy, determine prices and products offered by the petitioner, and negotiate with businesses. These responsibilities are categorized as non-managerial and non-executive as the beneficiary is performing operations of the company rather than managing or directing subordinate employees responsible for these functions. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). As the record does not contain a description of the tasks performed by the petitioner's two current employees, the manager and cashier, it cannot be assumed that they would perform any of the above-mentioned non-qualifying duties. Also, counsel's reference to the petitioner's proposed employees is not relevant, as the petitioner must establish at the time of filing the petition that the beneficiary would be relieved from performing the non-managerial and non-executive operations of the business. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Id.*

Counsel mistakenly claims on appeal that CIS fails to acknowledge that "in the real business world" executives and managers perform "general" responsibilities beyond their regular core duties. Neither the applicable statute nor regulations require that the beneficiary perform solely managerial or executive job duties. Rather, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). Here, the petitioner fails to document what proportion of the beneficiary's duties would be managerial or executive functions and what proportion would be non-managerial or non-executive. This information is relevant because, as noted above, the beneficiary would be performing non-qualifying job duties. Contrary to counsel's claims, the AAO recognizes that the beneficiary may be employed in a primarily managerial or executive capacity while still performing a portion of "general" responsibilities of the business. However, because of the lack of evidence submitted by counsel, the AAO is unable to determine whether the beneficiary primarily performs managerial or executive functions.

Counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. *See* section 101(a)(44)(C), 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001). To establish that the reasonable needs of the organization justify the beneficiary's job duties, the petitioner must specifically articulate why those needs are reasonable in light of its overall purpose and stage of development. In the present matter, the petitioner has not explained how the reasonable needs of the petitioning enterprise justify the beneficiary's performance of non-managerial or non-executive duties. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to

sections 101(a)(44)(A) and (B) or the Act. As discussed above, the petitioner has not established this essential element of eligibility.

Lastly, although counsel refers to three decisions by the Board of Immigration Appeals, counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in these cases. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. at 193.

Furthermore, the AAO notes that each decision precedes the current statute and regulations. The Immigration Act of 1990 requires that an individual "primarily" perform managerial or executive duties in order to qualify as a managerial or executive employee under the Act. The word "primarily" is defined as "at first," "principally," or "chiefly." *Webster's II New College Dictionary* 877 (2001). Where an individual is "principally" or "chiefly" performing the tasks necessary to produce a product or to provide a service, that individual cannot also "principally" or "chiefly" perform managerial or executive duties. Based on the foregoing discussion, the AAO cannot conclude that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. For this additional reason, the appeal will be dismissed.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, that burden has not been met. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.